No. 04-1034 and No. 04-1384

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN A. RAPANOS, *et al.*,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondents,

JUNE CARABELL, *et al.*,

Petitioner,

-v.-

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* THE CITY OF NEW YORK IN SUPPORT OF RESPONDENTS

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January 13, 2006

QUESTION PRESENTED

The City of New York ("City") relies on wetlands to protect and improve water quality in the watershed of its surface drinking water supply system. The question the City addresses is whether Clean Water Act protection extends to all wetlands that provide such water quality benefits, and that thus have a significant nexus, to navigable waters.

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INTERESTS OF *AMICUS CURIAE*

Amicus curiae the City of New York ("City") submits this brief in support of respondents United States of America, United States Army Corps of Engineers ("Army Corps"), and United States Environmental Protection Agency ("EPA") seeking affirmance of the United States Court of Appeals for the Sixth Circuit's decisions in *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004) and *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004).[1]

The City, a political subdivision of the State of New York, owns and operates a water supply system that provides water of excellent quality to some nine million residents of the City and State of New York. The City's water supply is not currently filtered and, based on the high quality of the water and the City's long-term plans for protecting against its degradation, EPA has granted a filtration avoidance determination[2] for the City's Catskill

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[1] Pursuant to Rule 37.6 of this Court, the City represents that counsel for the City authored this brief in its entirety and that no person or entity other than the City and its representatives made any monetary contribution to the preparation or submission of this brief. Consent to the filing of amicus briefs in support of either party was filed by counsel for the Rapanos petitioners on November 1, 2005, and by counsel for the Carabell petitioners on November 25, 2005. Counsel for respondents has consented to the filing of this brief, and a letter reflecting that consent is submitted to the clerk's office with this brief.

[2] Public water systems must either provide filtration or must demonstrate that they meet the rigorous requirements for filtration avoidance. 42 U.S.C. § 300g-1; 40 CFR §§ 141.71 and 141.171.

and Delaware water supply systems.[3] Together, the Catskill and Delaware systems supply approximately 90% of the City's drinking water. The water in the oldest of the City's three interconnected water supply systems, the Croton system, is scheduled to be filtered by 2011, but generally meets all applicable water quality requirements and is currently unfiltered.[4]

The extremely high quality of the City's water thus derives not from mechanical treatment but rather from the protection and treatment provided naturally within the nearly 2000 square miles of land that drain into the City's nineteen collecting reservoirs, including the extensive wetlands – approximately 25,800 acres – in that watershed area.

Within a watershed (the land area that drains into an ultimate receiving water), wetlands provide multiple functions that benefit the receiving water body. They ameliorate non-point source pollution by removing sediment, nutrients, and other pollutants from influent water sources.[5] They absorb water during high surface

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[3] *See* United States Environmental Protection Agency, New York City Filtration Avoidance Determination, (November 2002), available at http://www.epa.gov/Region2/water/nycshed/fad2002.pdf.

[4] Unlike the watersheds of the Catskill and Delaware supply systems, which consist largely of forested land west of the Hudson River, the Croton watershed is in more densely developed counties close to the City. Accordingly, the quality of Croton water has been adversely affected by development.

[5] Wetland vegetation ("hydrophytic vegetation") absorbs nutrients through biotic uptake, and slows the flow of surface waters, promoting sedimentation. The low oxygen conditions in

flow events storms and snowmelt, which decreases the volume and velocity of water entering streams and thus prevents or reduces downstream flooding and erosion. Wetlands also release stored water slowly back into streams, through surface outflows or groundwater recharge, maintaining stream flow within the watershed even under dry conditions.

Wetlands may occur in a variety of settings within a watershed. Many wetlands are within riparian zones along intermittent and perennial watercourses. Others are geographically remote from streams, surrounded by uplands, with discernable surface water connections to tributary systems only during periods of high flows, if ever. The benefits described above, which are critical to maintaining water quality in the City's watershed in particular, and in navigable waters in general, are provided by all wetlands within a watershed, regardless of how direct or frequent their surface connections to streams may be.[6]

The invaluable benefits provided by wetlands are particularly important in watersheds in which there has been significant land development, where stormwater runoff from impervious surfaces (i.e., surfaces which do not allow water to be absorbed into the ground, such as buildings and paved surfaces) may be a serious cause of

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wetland soils ("hydric soils"), resulting from their periodic saturation or inundation, promote biogeochemical transformations, such as denitrification. Thus, a variety of physical and biogeochemical mechanisms allow wetlands to remove nutrients, sediments, and other pollutants.

[6] A more detailed description of the functions of wetlands throughout a particular watershed is provided below.

pollution and degradation of surface waters. Stormwater runoff from developed areas transports pollutants, including nutrients from fertilizers, oil and grease from roadways, and sediments from improperly managed construction sites, to surface waters.[7] Similarly, impervious surfaces associated with development increase the volume and velocity of stormwater runoff.[8] Wetlands, as further described below, offer a valuable and natural means for dealing with these issues. Yet, development and associated land use changes are primary causes of loss and degradation of wetlands.[9]

The protection of wetlands through regulation is therefore critical. Wetlands protection regulations afford expert agencies, and the public, the opportunity to review and consider the value of wetlands in guarding against pollution, and the impacts of land use activities that will disturb, impair, or destroy wetlands.

The extensive freshwater wetlands in the City's watershed are protected pursuant to a variety of federal,

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[7] *See, e.g.*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, WHAT IS NONPOINT SOURCE (NPS) POLLUTION, QUESTIONS AND ANSWERS (August 18, 2003), available at http://www.epa.gov/OWOW/NPS/qa.html.

[8] *See, e.g.*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, MANAGING URBAN RUNOFF: POINTER NO. 7, (May 20, 2004), available at http://www.epa.gov/owow/nps/facts/point7.htm.

[9] *See, e.g.*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, WETLANDS: STATUS AND TRENDS (March 23, 2005), available at http://www.epa.gov/OWOW/wetlands/vital/status.html.

State, and local laws and regulations. The City has unusual, extraterritorial authority to review and approve certain activities in and adjacent to certain wetlands within the watershed of its drinking water supply. N.Y. Pub. Health Law § 1100(1) (McKinney 2005); N.Y. Comp. Codes R. & Regs. tit. 10, Part 128 (2005). The City's regulatory authority, however, like New York State's, is generally limited to wetlands exceeding 12.4 acres. N.Y. Comp. Codes R. & Regs. tit. 10, § 128-1.6(a)(116) (2005); N.Y. Comp. Codes R. & Regs. tit. 6, § 663.2(p) (2005). Based on the City's inventory of wetlands in the watershed of its water supply, nearly 10,000 acres, or 40 percent of these wetlands are not subject to regulation by New York State or the City because they do not meet the size threshold. Moreover, of these smaller wetlands, which nonetheless provide significant water quality benefits, approximately 4,300 acres, or 43 percent, lack regular, obvious surface connections to surface waters.

In contrast, the federal Clean Water Act regulates wetlands based on hydrology, soils, and vegetation rather than on size. *See, e.g.*, 33 C.F.R. § 328.3(b) (2006). The City thus relies on federal protection of smaller wetlands within its watershed. Indeed, recognizing the essential importance of small wetlands in the portion of the City's water supply system most affected by development, the ACOE has designated the City's Croton watershed as a Critical Resource Water. As a consequence, many of the "Nationwide Permits" that generally authorize projects disturbing less than half an acre of wetlands, subject to certain categorical conditions, do not apply in the Croton watershed, and thus any activity that will disturb a wetland – regardless of the size of the wetland or extent of disturbance – requires an individual permit. *See* Issuance of Nationwide Permits; Notice, Part II, 67 Fed. Reg. 2020, 2093 (Jan. 15, 2002).

The functioning of wetlands including wetlands that lack discernable surface connections to streams – in a typical sub-watershed within the City's water supply system is described below. Because of the critical importance of such wetlands, the City respectfully urges this Court to affirm that the Clean Water Act establishes jurisdiction over all wetlands with a significant nexus to the quality and quantity of the Nation's navigable waters.

SUMMARY OF ARGUMENT

Since 1972, the Federal Water Pollution Control Act, or "Clean Water Act," has provided a comprehensive framework for federal efforts to protect waters of the United States. 33 U.S.C. § 1251 *et seq.* Its objective is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* § 1251(a). Pursuant to Section 404(a) of the Act, any person must obtain a permit from the Army Corps of Engineers before discharging "dredged or fill material" into navigable waters. 33 U.S.C. § 1344(a). The Army Corps' regulations implementing Section 404(a) specify that permits are required for all fill activities that affect navigable waters, either directly or indirectly via tributary water bodies or wetlands. 33 C.F.R. §§ 320-29.

In *United States v. Riverside Bayview Homes*, this Court upheld the Army Corps' jurisdiction over wetlands adjacent to navigable waters, deferring to "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands." 474 U.S. 121, 134 (1985) ("*Riverside Bayview*"). In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, this Court clarified the scope of federal Clean Water Act jurisdiction by requiring a "significant nexus" between the regulated wetland and traditionally navigable waters. 531

U.S. 159, 167 (2001) ("*SWANCC*"). Several appellate courts, including the United States Court of Appeals for the Sixth Circuit in the instant cases, have used this type of analysis to sustain federal jurisdiction over wetlands that affect the quantity and quality of surrounding navigable waters, even when their hydrological connections to the navigable waters are intermittent or circuitous. *See, e.g., United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004); *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004); *United States v. Gerke Excavating*, 412 F.3d 804 (7th Cir. 2005); *Treacy v. Newdunn Associates*, 344 F.3d 407, 417 (4th Cir. 2003). Federal authority to restrict filling of such wetlands stems from the power to regulate activities which, particularly in the aggregate, "substantially impact interstate commerce," as discussed in *United States v. Lopez* 514 U.S. 549, 557 (1995). *See also Gonzalez v. Raich*, 125 S.Ct. 2195, 2205-08 (2005).

The City of New York, as the manager of a large and complex drinking water system and a regulator of certain land use activities in its watershed, shares the Army Corps' considered view that protecting hydrologically and ecologically connected wetlands is essential to protecting the quality and quantity of navigable waters. In fact, it would not be possible to achieve the stated purpose of the Clean Water Act if federal agencies lacked authority to regulate wetlands that satisfy the "significant nexus" test.

WETLAND FUNCTIONS WITHIN A WATERSHED

To illustrate the nexus of wetland protection to the protection of navigable waters, and particularly to emphasize the importance of small and remotely connected wetlands in protecting water quality, the City describes the water quality benefits provided by various wetlands within

the watershed of the City's West Branch reservoir. The West Branch reservoir is located within the City's Croton water supply system which, as noted above, is the most affected by development of the City's three interconnected water supply systems. It is a critical reservoir to the City, as it generally receives water from the City's Delaware Aqueduct, which carries approximately 50% of the City's entire water supply from four reservoirs to the west of the Hudson River, as well as from its own watershed.

Streams in the lowest portions of the watershed of the West Branch reservoir have the largest drainage areas, highest flows, and are typically navigable by canoe or kayak. Wetlands along these mainstem waters comprise roughly 40% of the wetland area in the West Branch reservoir watershed. When the flows in these streams exceed channel capacity – when the streams reach flood stage – adjacent wetlands detain and remove sediments, nutrients, and other pollutants from the floodwaters, minimizing flood damage and maintaining water quality. Data collected by the City from wetlands along Gipsy Trail Creek, a large stream in the West Branch reservoir watershed, show a net retention of flow, dissolved phosphorus, and suspended solids during the highest stream flows. In addition to the obvious benefit of such reduced flooding to riparian lands, the lower stream velocities produced by these wetlands mitigate against the erosion and suspension of sediments associated with high and rapid waters.

A system of "headwater" wetlands occurs in the upper reaches of the West Branch basin stream network, often at the sources of streams. These headwater wetlands comprise over 50% of the wetlands in the West Branch reservoir watershed, and all have intermittent or ephemeral surface connections to the mainstem channels that are

tributary to the West Branch reservoir. These headwater wetlands perform a multitude of functions and are among the most important for the quality of surface waters, despite their typical lack of perennial connections.

Headwater wetlands have the greatest opportunity of all wetland types to ameliorate non-point source pollution as they remove nutrients, sediment, and other pollutants from surface runoff *before* it is transported through the upstream tributaries into the mainstems of the watershed.[10] Of the wetlands predicted by the United States Fish and Wildlife Service ("USFWS"), in its functional assessment of wetlands in the City's Croton watershed, to be significant for nutrient transformation and sediment retention in the West Branch reservoir basin, 49% and 67%, respectively, are along headwater tributaries.[11] Headwater wetlands slow the velocity of surface runoff, which stabilizes stream banks and prevents erosion and associated water quality degradation. Forty percent of the wetlands predicted by the USFWS to be significant for shoreline stabilization in the West Branch watershed are in headwater positions.

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[10] NATIONAL RESEARCH COUNCIL, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT (2001) available at http://books.nap.edu/catalog/10134.html.

[11] R.W. TINER, C.W. POLZEN, AND B.J. MCCLAIN, UNITED STATES FISH AND WILDLIFE SERVICE, WETLAND CHARACTERIZATION AND PRELIMINARY ASSESSMENT OF WETLAND FUNCTIONS FOR THE CROTON WATERSHED OF THE NEW YORK CITY WATER SUPPLY SYSTEM (2004), prepared for and available from the New York City Department of Environmental Protection, Valhalla, NY. Subsequent references in this section to USFWS predictions also refer to this report.

In addition to these water quality benefits, headwater wetlands detain surface water from their catchment areas, which reduces and delays peak stream flows, thus reducing the frequency and severity of floods. In its watershed-scale functional assessment, USFWS estimated that approximately half of the wetlands that are significant for surface water detention in the West Branch reservoir watershed are located in headwater positions. Another study of the Croton Watershed found decreased peak flow and increased lag time between the period of maximum rainfall and maximum runoff in a sub-basin that contained a headwater wetland when compared to a similar sub-basin without such wetlands.[12]

Headwater wetlands are also important for maintaining stream flow, as detained stormwater is released slowly to stream channels during times of low flow. Ninety percent of wetlands predicted by the USFWS to be highly significant for streamflow maintenance in the West Branch Reservoir Watershed are along headwater tributaries. In addition, many of these headwater wetlands replenish groundwater, which forms the base flow for tributaries during dry periods.

Finally, a number of wetlands lack regular surface connections to tributary systems. These geographically isolated wetlands comprise approximately 4% of the wetland area in the West Branch reservoir watershed. Despite their lack of discernable surface water connections, these wetlands, like those in headwater wetland positions, are important for detaining surface waters and ameliorating

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[12] JAMES HASSETT, STATE UNIVERSITY OF NEW YORK COLLEGE OF ENVIRONMENTAL SCIENCE AND FORESTRY, THE CROTON PROCESS STUDIES PROJECT (2003).

non-point source pollution from their local catchment areas. Because they lack outflows, these wetlands serve as permanent "sinks" for precipitation, overland flow and any associated nutrients and pollutants that would otherwise flow to downgradient waters in surface runoff. These "isolated" wetlands also restore groundwater resources and thus contribute to the base flows of downgradient surface waters.

The wetlands in the West Branch reservoir watershed thus all have a significant nexus to water quality and quantity in the West Branch reservoir, among other navigable water bodies.

ARGUMENT

I

THE CLEAN WATER ACT PROVIDES FEDERAL JURISDICTION OVER ANY WETLAND WITH A "SIGNIFICANT NEXUS" TO NAVIGABLE WATERS.

It is well established that protection of wetlands was integral to Congress' efforts to preserve water quality on a broad scale under the Clean Water Act. *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). In *Riverside Bayview*, respondents challenged the Army Corps' jurisdiction over Michigan wetlands they sought to fill in preparation for construction of housing, arguing that jurisdiction under the Clean Water Act did not extend to an area of "low-lying, marshy land" adjacent to a navigable lake. *Id.* at 124. The Court rejected that argument, concluding that "the language, policies, and history of the Clean Water Act" supported the Army Corps' determination that wetlands adjacent to navigable waters were subject to Clean Water Act regulation. *Id.* at 139. In

unanimously upholding federal jurisdiction over these wetlands, the Court observed:

> In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.

474 U.S. at 134. The Court did not define or limit the application of the term "adjacent" in *Riverside Bayview*. Rather, the decision emphasized the ecological necessity of protecting nearby wetlands in order to protect the navigable waters with which they were connected. *Id.*

Significantly, the Court based its *Riverside Bayview* holding largely on deference to the Army Corps' scientific conclusions about the role of adjacent wetlands in preserving the quality of navigable waters. The Army Corps had determined that adjacent wetlands "may affect the water quality of adjacent lakes, rivers, and streams" because the wetlands may "drain into" the larger water bodies, and that they "may serve to filter and purify water draining into adjacent bodies of water ... and to ... prevent flooding and erosion...." *Id.* at 134. The Court concluded that these determinations, rooted in "the Corps' and EPA's technical expertise," were reasonable. *Id. See also United States v. Deaton*, 332 F.3d 698, 712 (4th Cir. 2001) ("breadth of congressional concern for protection of water quality and aquatic ecosystems" justifies federal Clean Water Act jurisdiction over headwater wetlands whose waters sometimes flow through drainage ditches into the

natural tributary system of a navigable river), *cert. denied*, 541 U.S. 972 (2004); *United States v. Pozsgai*, 999 F.2d 719, 727-34 (3rd Cir. 1999) (citing broad jurisdictional scope envisioned in legislative history of Clean Water Act in upholding federal regulation of wetland adjacent to navigable waters).

This Court next addressed the issue of Clean Water Act jurisdiction over wetlands in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*. 531 U.S. 159 (2000). Under *SWANCC*, which affirmed *Riverside Bayview*, federal regulators must demonstrate a "significant nexus" between the wetland in question and traditionally navigable waters in order to establish jurisdiction under Section 404(b) of the Clean Water Act.[13] *Id.* at 167.

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[13] This test has also been used to justify Clean Water Act jurisdiction over water bodies other than wetlands that are not navigable in fact, but which affect navigable waters. In *Headwaters v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001), for example, the Ninth Circuit held that certain irrigation canals were subject to federal Clean Water Act jurisdiction. *Id.* at 528-29. Although a system of mechanical gates separated the artificial canals from nearby natural streams under normal circumstances, the court found that occasional water leaks from the canals into the streams were sufficient to render them "connected" and to establish Army Corps jurisdiction over the canals. *Id.* at 533-34. *Cf. United States v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997) (upholding Clean Water Act jurisdiction over artificial drainage ditches, which intermittently fed into larger conduits which in turn emptied into Tampa Bay, noting that polluted water need not flow "immediately or continuously" from a non-navigable tributary into navigable waters "in order to inflict serious environmental damages").

In *SWANCC*, the Court ruled that a significant nexus to navigable waters did not exist where the only asserted basis for Army Corps jurisdiction over the wetlands in question was their serving as habitat for migratory birds. *Id.* Because the Army Corps' claim to jurisdiction was based exclusively on the "Migratory Bird Rule," the *SWANCC* Court focused on the inadequacy of that rule rather than on the question of the requisite hydrological connection between wetlands and navigable waters.

Thus, the specific holding in *SWANCC* has little bearing on the cases now before this Court, where hydrological connections between the wetlands at issue and navigable waterways have been demonstrated. In establishing the "significant nexus" test, however, the Court signaled that the determination of Clean Water Act jurisdiction over wetlands is appropriately made by agencies with technical expertise to evaluate the nature of the hydrological connections between wetlands and navigable waters.

In applying this Court's decisions in *Riverside Bayview* and *SWANCC*, courts have generally deferred to expert agencies when they have found a "significant nexus" between wetlands and navigable waters, even where the hydrological connections have been seemingly remote. In *Treacy v. Newdunn Associates*, for example, the Fourth Circuit upheld federal jurisdiction over wetlands connected to a traditionally navigable river through natural and artificial waterways, even though water flowed from the wetlands only "intermittently" and traveled along a convoluted 2.4 mile path, including a ditch running under an interstate highway, before reaching the river. 344 F.3d 407, 417 (4th Cir. 2003), *cert. denied, Newdunn Assocs. v. United States Army Corps of Engineers*, 541 U.S. 972

(2004). In *United States v. Deaton*, *supra*, the Fourth Circuit also found Clean Water Act jurisdiction over a wetland area whose path of hydrological connection to a navigable river stretched more than eight miles and consisted in part of a human-made roadside ditch.

Similarly, in *Northern California River Watch v. City of Healdsburg*, a district court found a significant nexus between an artificial gravel pit and the nearby Russian River, where "the wetlands in question help[ed] filter pollutants entering the aquifer and hence the river proper." No. C01-04686, 2004 U.S. Dist. LEXIS 1008, *29 (N.D. Cal. Jan. 23, 2004), No. 04-15442 (9th Cir. argued Nov. 16, 2005). Based on this finding of a direct water quality benefit provided by the wetland, the court held that federal jurisdiction was appropriate even though the water was exchanged through an underground aquifer rather than a surface connection. In *United States v. Lamplight Equestrian Center*, the Northern District of Illinois found Clean Water Act jurisdiction appropriate where seasonally saturated ground adjacent to a drainage ditch created an intermittent hydrological connection to a navigable river, observing that "[w]ater need not flow in an unbroken line at all times to constitute a sufficient connection to navigable water or its tributaries" for federal Clean Water Act jurisdiction. No. 00 C 6486, 2002 U.S. Dist. LEXIS 3694 at *20-*23 (N.D. Ill. Mar. 8, 2002).

In the cases now before the Court, the government has reasonably determined that the wetlands at issue are hydrologically connected to navigable waters and have a significant nexus to water quality and quantity in those waters. *Rapanos*, 376 F.3d at 634, 639-40; *Carabell*, 391 F.3d at 708-10. The Rapanos petitioners, whose wetlands bear an important hydrological connection to navigable waters, *Rapanos* at 642-43, challenge federal jurisdiction

because of the artificial nature of portions of the connection and the length and circuity of the route water travels between the wetlands and navigable waters. Where the agency with authority and expertise has found a significant nexus, however, these arguments must fail. *Deaton*, 332 F.3d 698; *Northern California River Watch v. City of Healdsburg*, 2004 U.S. Dist. LEXIS 1008.

Similarly, in *Carabell*, the court focused on the Army Corps' finding that the wetlands at issue provided "water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in" downgradient navigable waters. 391 F.3d at 706. As in *Treacy*, 344 F.3d 407, and *Lamplight Equestrian Center*, 2002 U.S. Dist. LEXIS 3694, the intermittent nature of a connection does not destroy its ecological significance during the seasons when flooding or seepage occur.[14]

Petitioners ask this Court to evaluate the hydrological connections between the particular wetlands at issue in the instant cases and navigable waters, and to make a determination that these connections are insufficient to give rise to Clean Water Act jurisdiction. As this Court has appropriately recognized, however, such determinations must be made by experts, based on site-specific information about the effects wetlands have on their receiving waters. *See Riverside Bayview*, 474 U.S. at 133-134; *SWANCC* 531 U.S. at 167.

Wetlands within a watershed may contribute significant base flow to, attenuate erosive flows in, and

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[14] Indeed, as noted above, wetlands perform many important functions during flooding.

remove excessive nutrients, sediments, and other contaminants from downgradient navigable waters. Such wetlands thus have a significant nexus to navigable waters, and should therefore be regulated under the Clean Water Act.

II

PRESERVATION OF WATER QUALITY BY REGULATING WETLANDS WITH A SIGNIFICANT NEXUS TO NAVIGABLE WATERS IS AN APPROPRIATE FEDERAL FUNCTION UNDER THE COMMERCE CLAUSE.

Contrary to the petitioners' protestations, federal jurisdiction over wetlands sharing a "significant nexus" with navigable waters of the United States is entirely appropriate under the Commerce Clause of the United States Constitution. Congress may properly assert jurisdiction pursuant to the Commerce Clause when it has a rational basis for believing that the regulated activity affects interstate commerce "sufficiently" to justify federal regulation. *United States v. Lopez*, 514 U.S. 549, 557 (1995).

The Court has recognized three permissible categories of regulation under the Commerce Clause: regulation of channels of interstate commerce; protection of instrumentalities of interstate commerce, including persons or things traveling interstate; and regulation of activities "having a substantial relation to" or "substantially affecting" interstate commerce. *Id.* at 558-59. While federal Clean Water Act jurisdiction includes direct regulation of waters that are navigable in fact and thus constitute "channels of commerce," Congress appropriately

assumed jurisdiction over a much broader range of waters, tributary to or otherwise influencing navigable waters, because they "substantially affect" interstate commerce.[15]

In order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. §1251(a), regulation of more than waters that are navigable in fact is thus required. To achieve the stated purpose of the Clean Water Act, agencies need the flexibility to regulate tributaries to the Nation's waters, wetlands with consistent or intermittent surface connections to such waters and, in some instances, wetlands which are hydrologically "isolated," but which nevertheless have a significant nexus to the commercial and ecological value of navigable waters.

In *United States v. Gerke Excavating*, 412 F.3d 804 (7th Cir. 2005), the Seventh Circuit rejected the argument that federal jurisdiction over privately owned wetlands exceeded the scope of federal Commerce Clause authority. Like the wetlands at issue in *Rapanos* and *Carabell*, and like many in the watershed of New York City's drinking water supply, the wetland at issue in *Gerke* was connected

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[15] In *SWANCC*, this Court considered whether Congress relied solely upon the "channels of commerce" basis of jurisdiction for the Clean Water Act but declined to reach a holding. 531 U.S. at 169 n.3, 172. Indeed, recognizing that the Clean Water Act covers activities well beyond the use of channels of commerce, the Court noted that to determine the extent of Clean Water Act regulation permissible under the Commerce Clause, it "would have to evaluate the precise object or activity that, *in the aggregate, substantially affects interstate commerce*." *Id.* at 173 (emphasis added). *See also Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1071 (D.C. Cir. 2003).

only indirectly via a ditch, a creek, and then a nonnavigable "river" to a river that was navigable in fact. *Id.* at 805. The court held first that by restricting the filling of wetlands that "supply some of the water in navigable waterways," federal regulators were protecting channels of interstate commerce. The Seventh Circuit went on to note that federal jurisdiction is appropriate "even if the pollution has no [physical] effect on navigability" and the impact on navigable waters' quality is the sole basis for asserting federal jurisdiction. *Id.* at 807.

Although filling a single wetland might seem attenuated from interstate commerce, through aggregation such fill activities can "substantially affect interstate commerce" and thus trigger federal jurisdiction under the Commerce Clause. *See Gerke*, 412 F.3d at 806-07; *see also Citizens Bank v. Alafabco*, 539 U.S. 52, 56-57 (2003) (Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'"); *Gonzales v. Raich*, __ U.S. __, 125 S.Ct. 2195, 2205-08 (2005).

As noted above, *SWANCC* and its subsequent interpretations have established that a "significant nexus" between a wetland and navigable waters is sufficient to justify federal regulation of the wetland. Where there is a significant nexus between wetlands and navigable waters, impairment of the wetlands significantly threatens water quality in the navigable body. This represents a "substantial relation" between the regulated activity (filling or other impairment of hydrologically connected wetlands) and interstate commerce (as practiced via navigable waters), and thus fulfills the test for Commerce Clause jurisdiction. *United States v. Lopez*, 514 U.S. 549; *United*

States v. Gerke Excavating, 412 F.3d at 806. *See also United States v. Cortes*, 299 F.3d 1030, 1036 (9th Cir. 2002); *United States v. Kung-Shou Ho*, 311 F.3d 589, 600-04 (5th Cir. 2002).

The functions of wetlands in the New York City watershed illustrate the substantial relationship between federal regulation of wetlands and interstate commerce. Ensuring that plans to dredge or fill wetlands are subject to appropriate reviews and approvals supports the maintenance of a clean drinking water supply – a service the absence of which would substantially affect interstate commerce. Protecting wetlands from fill and other impairments also helps wetlands store and discharge water when appropriate, thus ensuring a steady quantity and velocity of water flow in navigable bodies (in contrast to flood or drought conditions which can impair drinking water supplies). *See, e.g., Gerke*, 412 F.3d at 806.

CONCLUSION

For all the foregoing reasons, *amicus* the City of New York respectfully urges this Court to affirm the decisions of the Court of Appeals for the Sixth Circuit in order to avoid serious negative consequences for the many public agencies and authorities nationwide involved in maintaining clean and safe water supplies.

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